INDEX

Subject Index

	Page
Petition for writ of certiorari	1
Summary statement of the matter involved	1
Jurisdiction of this Court	4
Questions involved	5
Reasons relied on for the allowance of the writ	5
Prayer for writ	7
Brief in support of petition for writ of certiorari	9
I. Opinion of the court below	9
II. Jurisdiction	10
III. Statement of the case	10
IV. Specification of errors	10
V. Argument	11
Summary of argument	11
Point A—The question is important to the motor carrier industry and to the public	11
Point B—The question involved is of vital importance to the Interstate Commerce Commission in its control of the motor carrier industry	12
Point C—The agency of the driver of leased equipment engaged in an interstate franchise operation is a federal question	13
Point D—The decision of the court below is in conflict with local law	14
Point E—The court below erred in holding that the driver of the leased equipment was not the agent of the carrier as a matter of law	15
Point F—The respondent is estopped to deny that the driver was its agent	18
Conclusion	19

Table of Cases Cited

	Page
Boutell v. *Walling*, 327 U. S. 463	13
Brown v. *Truck Lines*, 227 N. C. 299, 42 S. E. (2d) 71	6, 14, 16
Deitrick v. *Greaney*, 309 U. S. 190	13
Erie R. Co. v. *Tompkins*, 304 U. S. 64	13
Hudson v. *Moonier*, 304 U. S. 397	13
Interstate Commerce Commission v. *F. and F. Truck Leasing Co.* (Case 2593, U. S. D. C. of Minn., 4th Div., decision June 2, 1948)	16
Jackson County v. *United States*, 308 U. S. 343	13, 14
Moore v. *United States*, 41 F. Supp. 786, aff. 316 U. S. 642	16
O'Brien v. *Western U. Teleg. Co.*, 1 Cir., 113 F. (2d) 539	14
O'Malley v. *United States*, 31 F. Supp. 1	16
Sola Elec. Co. v. *Jefferson Elec. Co.*, 317 U. S. 173	13
Steffens v. *Continental Freight Forwarders Co.*, 66 Ohio App. 534, 35 N. E. (2d) 734	16
Thompson v. *United States*, 321 U. S. 19	16
United States v. *American Trucking Ass'n.*, 310 U. S. 534	12
Wood v. *Miller*, 226 N. C. 567, 39 S. E. (2d) 608	6, 15

Table of Statutes Cited

Judicial Code Section 1254(1), 28 U. S. C. 1254(1)	5, 10
Part II, Interstate Commerce Act, 49 U. S. C. 301 et seq.	2, 5, 11
Part II, Interstate Commerce Act, 49 U. S. C. 304(a)(1)	6, 12
Part II, Interstate Commerce Act, 49 U. S. C. 311	14, 15
Part II, Interstate Commerce Act, 49 U. S. C. 315	17
Part II, Interstate Commerce Act, 49 U. S. C. 324	17

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 407

A. C. WIDENHOUSE, INDIVIDUALLY, AND TRADING AS CAROLINA OIL COMPANY,

Petitioner,

versus

WAR EMERGENCY CO-OPERATIVE ASSOCIATION

PETITION FOR WRIT OF CERTIORARI

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The Petitioner above named respectfully prays this Court for a writ of certiorari directed to the United States Court of Appeals for the Fourth Circuit, to the end that this Court may review the decision which the said Court of Appeals has rendered in this case; and the Petitioner respectfully shows to the Court:

Summary Statement of the Matter Involved

This is a tort action which by stipulation and agreement of the parties was restricted to the determination of the question of agency under the doctrine of *respondeat*

superior. The determination of the agency question involves the application of Part II of the Interstate Commerce Act (49 U.S.C. 301 *et seq.*), and the applicable rules and regulations of the Interstate Commerce Commission issued pursuant thereto.

The pertinent facts of the case may be briefly stated as follows:

Respondent, War Emergency Co-operative Association, a South Carolina corporation, was a common carrier by motor vehicle duly licensed by the Interstate Commerce Commission to transport gasoline in interstate commerce (R. 69-70). Petitioner, A. C. Widenhouse, a resident of North Carolina, did not hold a permit or license to operate any equipment as a carrier by motor vehicle in interstate commerce (R. 52-53). Petitioner owned certain trucking equipment which he leased to respondent by a written lease or agreement executed February 10, 1943, which lease was in full force and effect on September 28, 1943 (R. 52). The lease contained the following provision: "The Lessee shall engage and use an experienced and qualified employee or employees in operating the trucking equipment herein described and shall direct, control and manage the use thereof as if the title to same was vested in it" (R. 52, 99).

The leased equipment was thereafter used exclusively in respondent's business for the transportation of petroleum products as a common carrier in interstate commerce (R. 53). It was equipped with permit number and license number issued to respondent by the Interstate Commerce Commission, and only the name of respondent, together with other indicia of ownership by respondent, appeared on the equipment (R. 52, 77). Under the terms of the lease, and as required by the regulations of the Interstate Commerce Commission, respondent procured liability insurance on the leased equipment in its name (R. 52, 53, 69).

All shipments were made under respondent's bills of lading (R. 54). Respondent collected all transportation charges arising from the use of the leased equipment (R. 55, 66). Orders for the delivery of petroleum products by the leased equipment were transmitted to the petitioner by respondent or to the petitioner directly by the shipper as requested by respondent (R. 54, 76).

The costs of operation of the leased equipment, together with the wages of the driver, were borne by the petitioner (R. 56, 71). Respondent remitted to the petitioner as rental for the leased equipment an amount equal to the transportation or tariff charges collected by respondent from its shippers arising from the use of the equipment, less a percentage retained by respondent and a fixed deduction for liability insurance placed by respondent (R. 56, 68-69).

Petitioner was the individual owner of a gasoline and oil business and maintained on premises owned by him a large bulk plant, located at Concord, North Carolina. The transportation and delivery of petroleum products to the bulk plant of petitioner, by equipment leased to respondent by petitioner, was handled in an identical manner as the transportation and delivery of petroleum products to other consignees (R. 54, 55, 71).

One R. A. Booth was engaged for the purpose of driving the leased equipment, and transacted no business for petitioner personally. The employment of Booth was acquiesced in by the respondent, as admitted in paragraph five of respondent's further answer (R. 5). His wages were paid by petitioner, from which wages deductions were made for withholding and social security taxes (R. 56, 62-63).

On September 28, 1943, petitioner's bulk gasoline plant was destroyed by a fire and explosion which occurred during the delivery of an interstate shipment of gasoline at the bulk plant by means of the leased equipment operated by R. A. Booth.

Petitioner and respondent have stipulated in the record that the negligence of R. A. Booth proximately caused the destruction of the property of petitioner, and that R. A. Booth was acting during the course of, and within the scope of, his employment, and while in the furtherance of his master's business (R. 51).

Petitioner instituted action against respondent in the Superior Court of Cabarrus County, North Carolina, to recover damages for the destruction of his property caused by the negligent act of the driver of the leased equipment, which action was removed by respondent to the District Court of the United States for the Middle District of North Carolina on the ground of diversity of citizenship. Jury trial was waived and upon findings of fact and conclusions of law (R. 82), the District Court entered judgment for petitioner and against respondent in the sum of $20,545.64 (R. 107).

On appeal by respondent, the United States Court of Appeals for the Fourth Circuit reversed the judgment of the District Court by holding that the driver of the leased equipment was not the agent of respondent but that he was the agent of petitioner, who was termed an independent contractor (R. 116).

The judgment of the Court of Appeals reversing the District Court is a final decision as to the issue, and denies petitioner the right to recover against respondent.

The question of law as to the agency of the driver of the leased equipment is the only issue dealt with and passed upon in all proceedings up to this point, other than the amount of damages which is not disputed.

Jurisdiction of This Court

Jurisdiction to review, through the procedure of certiorari, the decision of the Court of Appeals in this case is conferred upon this Court by the provisions of Title 28,

United States Code, Section 1254(1) (formerly 28 U.S.C. 347(a)).

It is contended by petitioner that the Court of Appeals in this case has decided an important question of Federal law which has not been, but should be, settled by this Court (Rule 38(5)(b)).

If it should be determined that the question is not one of Federal law, then the Court of Appeals has decided an important question of local law in a way probably in conflict with applicable local decisions (Rule 38(5)(b)).

Judgment was entered in this case by the United States Court of Appeals for the Fourth Circuit on August 14, 1948 (R. 120). The date of the filing of this petition is November 12, 1948.

Questions Involved

Under the provisions of Part II of the Interstate Commerce Act (49 U. S. C. 301 *et seq.*), and the rules and regulations of the Interstate Commerce Commission, is the driver of a motor vehicle leased to a franchise interstate motor carrier the agent of the carrier?

More particularly, did the Court of Appeals err in holding as a matter of law that the driver of the leased equipment was not the agent of respondent but was the agent of petitioner, who was termed an independent contractor?

Reasons Relied On for the Allowance of the Writ

1. The question involved has not been passed upon by this Court. The question is important to the entire interstate motor carrier industry and to the public, and the prominence of this expanding industry emphasizes the need of an authoritative and elucidating decision particularly with reference to the legal responsibility of an interstate franchise motor carrier in the operation of leased equipment.

2. Congress having entered the field by enacting the Motor Carrier Act (Part II, Interstate Commerce Act) and having delegated the duty to regulate common carriers by motor vehicle to the Interstate Commerce Commission (49 U. S. C. 304(1)), the question involved is of vital importance to such regulation with respect to the control over the qualifications of employees, and the safety of operation and equipment. Control can be exercised only through the regulation of franchise carriers who must have direction and control over their equipment and drivers.

3. The decision of the Court of Appeals as to the agency of the driver of equipment engaged in an interstate franchise operation, holding that the driver was not the agent of the franchise carrier, is a decision involving an important question of Federal law which has not been, but should be, settled by this Court. The decision is one within the policy of the law so dominated by the sweep of Federal statutes and regulations that legal relations which they affect must be deemed Federal questions governed by Federal law having its source in those statutes and regulations.

4. Should it be determined that the question involved is not a Federal one, then the decision of the Court of Appeals as to the agency of the driver of the equipment, holding that such driver was the agent of petitioner, who was termed an independent contractor, rather than the agent of respondent, decided an important question of local law in a way probably in conflict with applicable local decisions. The decision of the Court of Appeals is contrary to the decisions of the Supreme Court of North Carolina, a court of last resort, in the cases of *Brown* v. *Truck Lines* (227 N. C. 299, 42 S. E. (2d) 71) and *Wood* v. *Miller* (226 N. C. 567, 39 S. E. (2d) 608), as to the effect of Part II of the Interstate Commerce Act and the rules and regula-

tions of the Interstate Commerce Commission on the question involved.

5. The Court of Appeals erred in concluding and holding that the driver of the leased equipment, which driver's negligence proximately caused the damage to the property of petitioner, was the agent of petitioner who was termed an independent contractor rather than the agent of respondent. As a matter of law the driver of the leased equipment was the agent of respondent under Part II of the Interstate Commerce Act, the rules and regulations of the Interstate Commerce Commission, and by virtue of the franchise granted by the Interstate Commerce Commission, the lease agreement, and by the acquiescence of respondent in the employment of the driver.

The respondent is estopped to deny that the driver of the leased equipment was its agent by accepting its franchise, by the existence of the lease, by acquiescing in the employment of the driver, and by placing liability insurance coverage on the equipment in its name and paying the premiums therefor.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Court of Appeals for the Fourth Circuit, commanding that court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, No. 5749, *War Emergency Co-Operative Association, Appellant* v. *A. C. Widenhouse, individually, and trading as Carolina Oil Company, Appellee,* and that the said judgment of the United States Court of Appeals for the Fourth Circuit may be reversed by this Honorable Court, and that your peti-

tioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioner will ever pray.

A. C. WIDENHOUSE,
Petitioner.
LUTHER T. HARTSELL, JR.,
JOHN HUGH WILLIAMS,
Counsel for Petitioner.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 407

A. C. WIDENHOUSE, INDIVIDUALLY, AND TRADING AS CAROLINA OIL COMPANY,

Petitioner,

versus

WAR EMERGENCY CO-OPERATIVE ASSOCIATION

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I. Opinion of the Court Below

The opinion in the United States Court of Appeals for the Fourth Circuit is entitled on its docket, No. 5749, War Emergency Co-operative Association, Appellant, v. Marie Widenhouse, trading as Carolina Service Station No. 1, D. C. Beard, and A. C. Widenhouse, individually and trading as Carolina Oil Company, Appellees, and was decided August 14, 1948. The opinion is printed in full in the record (R. 114). This petition concerns the case of A. C. Widenhouse only.

II. Jurisdiction

1. Jurisdiction to review, through the procedure of certiorari, the decision of the Court of Appeals in this case is conferred upon this Court by the provisions of Title 28, United States Code, section 1254(1) (formerly 28 U. S. C. 347(a)).

2. The judgment to be reviewed was entered by the United States Court of Appeals for the Fourth Circuit on August 14, 1948 (R. 120).

3. The Court of Appeals has in this case decided an important question of Federal law which has not been, but should be, settled by this Court. (Supreme Court Rule 38(5)(b)). And if it should be determined that the question is not one of Federal law, then the Court of Appeals has decided an important question of local law in a way probably in conflict with applicable local decisions (Rule 38 (5)(b)).

III. Statement of the Case

A concise statement of the relevant facts appears in the petition to which this brief is annexed under the heading of "Summary Statement of the Matter Involved", and in the interest of brevity, the statement is not being repeated.

IV. Specification of Errors

1. The Petitioner assigns as error the reversal by the Court of Appeals of the judgment which was rendered in the District Court.

2. The Court of Appeals erred in concluding and holding that the driver of the leased equipment, whose negligence proximately caused the damage to the property of petitioner, was the agent of petitioner who was termed an independent contractor rather than the agent of respondent,

an authorized carrier by motor vehicle in interstate commerce.

V. Argument

This is a tort action which by stipulation and agreement of the parties was restricted to the determination of the question of agency under the doctrine of *respondeat superior*. Thus the question of law as to the agency of the driver of the leased equipment is the only issue presented for decision.

Summary

The decision of the court below should be reviewed and reversed for the following reasons: (A) The question involved is important to the entire interstate motor carrier industry and to the public; (B) It is of vital importance in the regulation of the industry by the Interstate Commerce Commission with respect to control over the qualifications of employees and the safety of operation and equipment; and (C) it is a Federal question which has not, but should be, passed upon by this Court. (D) If the question is not determined to be a Federal one, the decision of the court below is probably in conflict with applicable local law. (E) The court below erred in holding that the driver of the leased equipment was not the agent of the authorized carrier as a matter of law. (F) The respondent is estopped to deny that the driver was its agent.

A. *The question is important to the motor carrier industry and to the public.*

The growth of the motor carrier industry impelled Congress to enact the Motor Carrier Act of 1935 (Part II, Interstate Commerce Act, 49 U. S. C. 301 *et seq.*). Safety of operation was constantly before the Committees and Congress in their study of the situation. It is clear that

Congress intended to exercise its powers in the nontransportation phases of motor carrier activity. *United States* v. *American Trucking Association,* 310 U. S. 534, 538.

It has become the increasing practice in the motor carrier industry for carriers to augment their over-the-road equipment by leasing vehicles from non-franchise owners. The problem has become of sufficient consequence to cause the Interstate Commerce Commission to institute a series of hearings on the matter, which hearings began on October 11, 1948. The question of the legal responsibility of an interstate franchise motor carrier for the operation of leased equipment has become important to the entire industry and to the public which is affected by the safety of its operation.

B. *The question involved is of vital importance to the Interstate Commerce Commission in its control of the motor carrier industry.*

Congress has imposed upon the Interstate Commerce Commission the duty of regulating the interstate motor carrier industry.

Title 49 U. S. C., Section 304 (a)(1), reads in part as follows:

> "It shall be the duty of the Commission—(1) To regulate common carriers by motor vehicle * * *, and to that end the Commission may establish reasonable requirements with respect to * * * qualifications * * * of employees, and safety of operation and equipment".

Pursuant to this delegation of authority the Commission has adopted rules and regulations governing the qualifications of employees, and safety of operation and equipment.

Control can be exercised by the Commission only through the regulation of franchise carriers who must have direction

and control over their equipment and drivers. The Commission's jurisdiction is limited to employees of authorized carriers. *Boutell* v. *Walling*, 327 U. S. 463.

The decision of the Court of Appeals in this case nullifies the control by the Commission over certain drivers of vehicles operating in interstate commerce under franchise authority issued by the Commission.

C. *The agency of the driver of leased equipment engaged in an interstate franchise operation is a Federal question.*

Congress having entered the field by enacting Part II of the Interstate Commerce Act, and having delegated the duty to regulate common carriers by motor vehicle to the Interstate Commerce Commission, and the Commission having promulgated rules and regulations pursuant thereto, the issue of the agency of the driver of leased equipment engaged in an interstate franchise operation is a Federal question.

Ordinarily questions of tort liability are determined by local law. *Hudson* v. *Moonier*, 304 U. S. 397. The cited case and the doctrine of *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, do not apply to the instant case, because neither involved the application of Federal statutes and regulations. Furthermore, all questions of tort liability in the instant case have been resolved and only the question of agency as a matter of law is at issue. The doctrine that Federal courts should follow State decisions on matters of general jurisprudence is inapplicable to those areas of judicial decision within which the policy of the law is so dominated by the sweep of Federal statutes that legal relations which they affect must be deemed governed by Federal law having its source in those statutes, rather than by local law. *Sola Elec. Co.* v. *Jefferson Elec. Co.*, 317 U. S. 173, 176; *Deitrick* v. *Greaney*, 309 U. S. 190, 200, 201; *Jackson County*

v. *United States,* 308 U. S. 343, 349, 350; *O'Brien* v. *Western U. Teleg. Co.* (1 Cir.), 113 F.(2d) 539, 541.

The decision of the Court of Appeals as to the agency of the driver of equipment engaged in an interstate franchise operation, holding that the driver was not the agent of the franchise carrier, is a decision involving an important question of Federal law which has not been, but should be, settled by this Court.

D. *The decision of the court below is in conflict with local law.*

The cause of action arose in the State of North Carolina. The Supreme Court of North Carolina has expressed itself on the question involved in the case of *Brown* v. *Truck Lines,* 227 N. C. 299, 42 S. E. (2d) 71. Portions of the opinion are quoted:

> "Here the defendant . . . was a motor carrier of goods in interstate commerce, operating under authority of a certificate or license issued by the Interstate Commerce Commission. Transportation in interstate commerce by an interstate motor carrier is subject to the applicable provisions of the Federal statutes governing such carriage, and the rules, regulations and requirements of the Interstate Commerce Commission. 49 U. S. C. A., secs. 301, et seq. . . . The operation of the truck was in law under the supervision and control of the interstate franchise carrier and could be lawfully operated only by those standing in the relationship of employees to the authorized carrier . . . . The defendant Motor Lines could not contract for the use of a truck or employ an independent truck owner not a holder of certificate or permit from the Interstate Commerce Commission (49 U. S. C. A., sec. 311), except under its own license plates, and by virtue of its franchise.
>
> "The transportation of goods in interstate commerce by motor vehicles was required to be under the

rules and regulations of the Interstate Commerce Commission, and the Brown truck could only have been used in such transportation by the defendant franchise carrier as one of its fleet of trucks under its license plates. Hence it would seem to follow that control of the operation for the period of the lease was given to the licensed carrier, and that the owner-driven truck was in contemplation of law in its employ and the driver for the trip stood on the relationship of its employee. . . .

"The act of the defendant in accord with the provisions of the lease in placing its own license plates on Brown's truck under the circumstances disclosed, thus giving it the status and holding it out as its own vehicle for the purposes of this trip, a procedure which alone authorized its operation, must be regarded as an assumption of such control as would defeat the plea of non-liability for injury to the driver on the ground of independent contractor. Control of the employer must be completely surrendered to relieve liability."

Reference is also made to the case of *Wood* v. *Miller*, 226 N. C. 567, 39 S. E. (2d) 608.

E. *The court below erred in holding that the driver of the leased equipment was not the agent of the carrier as a matter of law.*

Respondent was a common carrier by motor vehicle in transporting petroleum products in interstate commerce. It was the holder of a certificate of convenience and necessity from the Interstate Commerce Commission and was subject to the provisions of Part II of the Interstate Commerce Act and all rules and regulations of the Interstate Commerce Commission. Respondent could not contract for the use of a truck or employ an independent truck owner not a holder of a certificate or permit from the Interstate Commerce Commission, except under its own license plates, and by virtue of its franchise (49 U. S. C. 311).

On August 13, 1936, the Commission issued Administrative Ruling No. 4, as follows:

> "The lease or other arrangement by which the equipment of an authorized operator is augmented must be of such a character that the possession and control of the vehicle is, for the period of the lease, entirely vested in the authorized operator in such a way as to be good against all the world, including the lessor; that the operation thereof must be conducted under the supervision and control of such carrier; and that the vehicle must be operated by persons who are employees of the authorized operator, that is to say, who stand in the relation of servant to him as master."

This ruling has been cited in the following cases: *Interstate Commerce Commission* v. *F. and F. Truck Leasing Co., et al.* (Case No. 2593, U. S. D. C. of Minn., 4th Division, decision June 2, 1948); *Brown* v. *Truck Lines,* 227 N. C. 299, 307, 42 S. E. (2d) 71, 75; *Steffens* v. *Continental Freight Forwarders Co.,* 66 Ohio App. 534, 35 N. E. (2d) 734.

As a common carrier respondent was required to and did exercise direction and control over its vehicles and held itself out to the general public as engaging in the operation for which it received its franchise. Respondent could not operate under its franchise through independent contractors. *Thompson* v. *United States,* 321 U. S. 19; *O'Malley* v. *United States,* 38 F. Supp. 1; *Moore* v. *United States,* 41 F. Supp. 786, affirmed 316 U. S. 642.

The equipment lease (R. 52, 97) placed the direction and control in respondent "as if title to same was vested in it". The lease further provided that "lessee (respondent) shall engage and use an experienced and qualified employee or employees in operating the trucking equipment. . . ."

The lease was in full force and effect at the time the cause of action arose (R. 52). Respondent alleged the

existence of the lease in its answer (R. 4), and its existence has not been denied.

Pursuant to the lease, the equipment was used exclusively by respondent in its operation as a common carrier (R. 53). The lessor (petitioner) did not hold a certificate or license from the Interstate Commerce Commission to operate any equipment in interstate commerce (R. 52-53). I. C. C. Permit Number and other indicia of ownership by respondent were placed on the leased equipment in accordance with the rules and regulations of the Interstate Commerce Commission (49 U. S. C. 324).

The driver was engaged for the sole purpose of operating the leased equipment. His employment was acquiesced in by the respondent as set forth in paragraph five of respondent's further answer (R. 5), which was introduced in evidence (R. 82). Although the wages of the driver were paid by petitioner as a matter of convenience, this did not alter the legal relationship of the parties.

All shipments were made under respondent's bills of lading, and all transportation charges were paid directly to respondent by the shippers, including all shipments to petitioner doing business as Carolina Oil Company (R. 54-55). Thus petitioner occupied the same position as any other consignee or member of the public in the instant delivery. Orders for delivery of petroleum products by the leased equipment were transmitted to the petitioner by the respondent or to the petitioner directly by the shipper, as a matter of convenience, as requested by the respondent (R. 54, 76).

Under Sec. 315 of Part II of the Interstate Commerce Act (49 U. S. C. 315) no certificate or permit shall be issued to a motor carrier or remain in force, unless such carrier complies with the rules and regulations of the Interstate Commerce Commission regarding the filing and approval of liability insurance to cover injury or damage to

persons or property of others "resulting from the negligent operation, maintenance, or use of motor vehicles under such certificate or permit". Liability insurance was procured and placed by respondent in its name, as required by the regulations and under the terms of the equipment lease (R. 52, 97).

It is contended by the petitioner that by virtue of Part II of the Interstate Commerce Act, the rules and regulations of the Interstate Commerce Commission, the existence of the franchise, the lease agreement, the acquiescence of the respondent in the employment of the driver, and the course of business dealings, as above set forth, the driver of the leased equipment was the agent of respondent as a matter of law.

The undisputed evidence shows that at no time did respondent relinquish its exclusive right and power to control, direct and interfere in the operation of the leased equipment (R. 57, 71, 72). The duty to exercise this control and direction arose under respondent's franchise. The right and power to do so was granted by the equipment lease. Therefore, as a general principle of law, the existence of respondent's control and direction over the operation of the leased equipment and its responsibility to do so under its franchise completely negate a conclusion that petitioner was an independent contractor.

F. *The respondent is estopped to deny that the driver was its agent.*

It would be unconscionable and inequitable to permit respondent to receive the benefit of its franchise and deny in this case that it operated in accordance with the rules and regulations of the franchise authority, to agree by lease to assume the direction and control of the equipment as if title was vested in it and deny that it exercised direction and control, to acquiesce in the employment of the driver

of the equipment in its behalf and deny that the driver was its agent, to agree to and place liability insurance on the equipment in its name and deny to the other party to the agreement the benefit of this insurance.

It is earnestly contended by petitioner that by virtue of the franchise, the responsibility assumed thereby, the existence of the equipment lease, the acquiescence in the employment of the driver of the equipment, and the placing of liability insurance on the equipment as agreed by the lease and required by Federal law, respondent is estopped to deny that the driver was its agent.

Conclusion

For the reasons set forth in the petition for writ of certiorari and in this brief, and in order that the petitioner may not be deprived of his right under the law, it is respectfully submitted that the supervisory powers of this Court should be exercised to correct the erroneously grounded decision of the Court of Appeals; and that to such an end a writ of certiorari should be granted and this Court should review the decision of the Court of Appeals and finally reverse it and affirm the judgment of the District Court.

Respectfully submitted,

LUTHER T. HARTSELL, JR.,
JOHN HUGH WILLIAMS,
Counsel for Petitioner.

(9168)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 407

A. C. WIDENHOUSE, INDIVIDUALLY, AND TRADING AS CAROLINA OIL COMPANY,

Petitioner,

vs.

WAR EMERGENCY CO-OPERATIVE ASSOCIATION,

Respondent.

BRIEF OF RESPONDENT, WAR EMERGENCY CO-OPERATIVE ASSOCIATION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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INDEX

Subject Index

Page

Part I

Answer to petition for writ 1
Summary statement of matter involved 2
Statement of facts 2
Jurisdiction of court 8
Questions involved (proposed by petitioner) 9
Reasons relied on for allowance of writ 9
Prayer of respondent 11

Part II

Answer to brief of petitioner 13
I. Opinion of Court below 13
II. Jurisdiction 13
III. Statement of case 14
IV. Specification of errors 14
V. Summary 15
Petitioner's Points A & B 15
Petitioner's Point C 16
Petitioner's Point D 17
Petitioner's Point E 23
Petitioner's Point F 24
VI. Questions advanced by respondent 25
Question A 25
Question B 25
Question C 26
Question D 27
Conclusion 28

Table of Cases Cited

Aderholt v. *Condon*, 189 N. C. 748; 128 S. E. 337 11
Arrogante Barcelones, The, 20 U. S. 496; 7 Wheat. 496 27
Beach v. *McLean*, 219 N. C. 521; 14 S. E. (2nd) 515 .. 11, 20

Page

Bixler v. *Britton*, 192 N. C. 199; 134 S. E. 488 26
Boutell v. *Walling*, 327 U. S. 463 16
Brown v. *Trucking Line*, 227 N. C. 299; 42 S. E. (2nd) 71 ..... 11, 21
Brown v. *New York Life*, 152 Fed. (2nd) 246 27
Bryson v. *Lumber Co.*, 204 N. C. 664; 169 S. E. 276 .. 11
Craige v. *Austin Powder Co.*, (4th Cir.), 91 Fed. (2nd) 664 18
Crimp v. *Cresto, Transfer Co.*, 50 Fed. Sup. 534 18
Davenport v. *Patrick*, 227 N. C. 686; 44 S. E. (2nd) 203 27
Elliott v. *Lindquist*, 169 A.L.R. 1370 26
Erie R. Co. v. *Tompkins*, 304 U. S. 64 ..... 10, 11, 17
Ewing v. *Vaugh* (4th Cir.), 169 Fed. (2nd) 837 18
Fox v. *Cramerton Mills*, 229 N. C. 580; 35 S. E. (2nd) 869 21
Gabriel v. *Town of Newton*, 227 N. C. 314; 42 S. E. (2nd) 96 21
Hayes v. *Bd. Trustees Elon College*, 224 N. C. 11; 29 S. E. (2nd) 137 ..... 11, 19
Hodges v. *Johnson*, 58 Fed. Sup. 488 18
Hotchner v. *Neon Products*, 163 Fed. (2nd) 672 26
Hudson v. *Monier*, 304 U. S. 397 17
Lord Construction Co. v. *U. S.*, 28 Fed. (2nd) 340 27
Malisfski v. *Indemnity Ins. Co.*, 135 Fed. (2nd) 910 .. 18
Maxton Auto Co. v. *Rudd*, 176 N. C. 497, 97 S. E. 477 . 27
Mercantile Comm. Bk. & Trust Co. v. *Equitable Life*, 143 Fed. (2nd) 397 27
Norfolk & W. R. Co. v. *Hall* (4th Cir.), 57 Fed. (2nd) 1004, 1008 18
Rawson v. *Jones-Winifrede Coal Co.*, 100 W. Va. 263, 130 S. E. 492 11
Reid v. *City Coach Co.*, 215 N. C. 469, 2 S. E. (2nd) 578 27
Rewis v. *N. Y. Life*, 226 N. C. 325, 38 S. E. (2nd) 97 .. 21
Russell v. *Oil Co.*, 206 N. C. 341, 174 S. E. 101 11
Std. Oil Co. v. *Anderson*, 212 U. S. 215, 221, 222 18
Thomas v. *Gas Co.*, 218 N. C. 429, 11 S. E. (2nd) 297 .. 11
U. S. v. *American Trucking Assn.*, 310 U. S. 534-538 15

Page

Venuto v. *Robinson* (3rd Cir.), 118 Fed. (2nd) 679, 314 U. S. 627 ..... 10, 17, 18
Wood v. *Miller*, 226 N. C. 567, 39 S. E. (2nd) 608 .... 11, 22

13 C.J. Page 591, Sec. 606 26
21 C.J. Page 1206, Sec. 207 27

TABLE OF STATUTES CITED

U.S.C. Section 1254 (1) 8
Part II—Interstate Commerce Act 49 U.S.C. 301 et seq. 9, 15
General Statutes of N. C., G. S. 97-2(b) 21

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 407

A. C. WIDENHOUSE, INDIVIDUALLY, AND TRADING AS CAROLINA OIL COMPANY,

Petitioner,

vs.

WAR EMERGENCY CO-OPERATIVE ASSOCIATION,

Respondent.

BRIEF OF RESPONDENT, WAR EMERGENCY CO-OPERATIVE ASSOCIATION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

PART I—ANSWER TO "PETITION"

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The Respondent above named respectfully prays that the Petition for Writ of Certiorari to be directed to the United States Circuit Court of Appeals for the Fourth Circuit, to the end that this Court may review the decision which the

said Court of Appeals has rendered in this case, be denied; and the Respondent respectfully shows to the Court:

Summary Statement of Matter Involved

This is an action in tort heard before the Honorable Johnson J. Hayes, District Judge of the United States District Court, for the Middle District of North Carolina, at the August 1947 Term at Salisbury, North Carolina. Trial by jury was waived and the trial resulted in judgment in favor of the Petitioner.

The major question involved in this action is:

> "Was R. A. Booth, the driver of a tank truck whose negligence proximately caused the damage, the agent or employee of the Respondent, War Emergency Co-Operative Association, or of the Petitioner, A. C. Widenhouse?"

The Petitioner contends that the question of master and servant or agency is controlled by the provisions of Part II of the Interstate Commerce Act (49 U.S.C. 301, *et seq.*) and the rules and regulations of the Interstate Commerce Commission issued pursuant thereto.

The Respondent, War Emergency Co-Operative Association, contends that the question of master and servant, or agency, is controlled by the law of the State of North Carolina as determined in the decisions of the Supreme Court of that State.

Statement of Facts

Immediately prior to December 31, 1942, due to the war emergency, there were, throughout the States of North Carolina and South Carolina, numerous persons who owned tank trucks suitable for the transportation of petroleum products who were unable to meet the operational requirements of the Office of Defense Transportation and the

Interstate Commerce Commission. At the suggestion of an agent of the United States Government (R.P. 67), War Emergency Cooperative Association was organized and incorporated for the purpose of providing a method by which they could meet such requirements and thereby operate their vehicles in interstate and intrastate commerce (R.P. 67).

The Respondent, War Emergency Co-Operative Association, was chartered and organized under the laws of the State of South Carolina, with its principal office and place of business at Spartanburg, South Carolina. It obtained a certificate of convenience and necessity from the Interstate Commerce Commission, met the requirements of the Office of Defense Transportation, and the Petitioner, A. C. Widenhouse, with many others, became members of the Association (R.P. 67, 68).

On December 31, 1942, the Petitioner, A. C. Widenhouse, who at the time owned five (5) tank trucks of the type hereinbefore described, leased them to the Respondent War Emergency Co-Operative Association, by a lease in writing (R.P. 97) which contained among other things, the following provisions:

> "To Have and To Hold, for a term beginning on the 31st day of December, 1942, and ending on the 31st day of December, 1944, on the terms and subject to the cancellation provisions hereinafter provided.
>
> 1. The amount of rental that Lessee shall pay to Lessor for said equipment shall depend on the amount of petroleum products hauled therewith and shall depend on the points from and to which such petroleum products are hauled; and *shall be an amount of money equal to five per cent of the revenue which would be produced if said petroleum products were hauled at the rates established and in force at the time of hauling* and under which the War Emergency Co-Operative

Association is operating, provided, however, the rental rate shall not be greater or less than other members of War Emergency Co-Operative Association enjoy.

2. *The rental due hereunder shall be paid monthly* or before the tenth (10th) day of the month following the month in which the petroleum products are hauled.

3. The ordinary maintenance of said trucks, caused from wear and tear, shall be at the expense of Lessor, and if made by Lessee or some third party at the instance of Lessee, the cost thereof shall be paid for by Lessor on demand.

4. *The Lessee shall engage and use an experienced and qualified employee or employees in operating the trucking equipment herein described and shall direct, control and manage the use thereof as if the title to same was vested in it.*

5. Any indebtedness which may be or become owing to Lessee by Lessor may be deducted from any rent which may become owing to Lessor by Lessee under this agreement." (R.P. 98, 99.)

In the beginning of the operations, it was the practice for orders for the transportation of petroleum products to be received by War Emergency Co-Operative Association and directed by it to the member-lessors who would execute the orders by making delivery to the purchasers (R.P. 54, 76, 77). The orders directed that the products be obtained at the tap on the pipe lines at Salisbury, North Carolina, and Spartanburg, South Carolina.

Shortly after operations were begun, by agreement between the members of the association (including the Petitioner, A. C. Widenhouse), Respondent, War Emergency Co-Operative Association, and the various oil companies for whom deliveries were to be made, the method of forwarding orders to the member-lessors was changed. Under the new arrangement, orders were sent from the oil com-

panies (shippers) directly to the member-lessors, including the Petitioner A. C. Widenhouse. Under this arrangement, the Respondent, War Emergency Co-Operative Association, never knew of the existence of orders until after they were received by the member-lessors and fully executed. (R.P. 65.)

At the same time the method of paying rental by the Respondent to the member-lessors was changed without a corresponding change being made in the written lease (R.P. 56, 66, 67). Under the terms of the written lease, the Respondent agreed to deduct five (5%) per cent from the charges for transportation of petroleum products and remit such five (5%) per cent to the member-lessors as rental for the tank truck (Item #1 of Lease, R.P. 98). The remaining ninety-five (95%) per cent was to be retained by the Respondent for the payment of all expenses of operation, including drivers' wages, taxes, insurance, and all other expenses except ordinary wear and tear. Under the new agreement, unreflected in the lease, the Respondent kept five (5%) per cent and remitted ninety-five (95%) per cent to the member-lessors (R.P. 56, 66, 67) who paid all the expense of operation of the tank trucks including the wages of drivers (R.P. 57), social security, and withholding taxes on such wages. The Petitioner, A. C. Widenhouse, in addition thereto, obtained and provided insurance for his liability to his employees, including R. A. Booth, under the North Carolina Workmen's Compensation Act.

The parties, from the beginning, disregarded Item #4 of the Lease (R.P. 99), reading as follows:

> "The Lessee shall engage and use an experienced and qualified employee or employees in operating the trucking equipment herein described and shall direct, control and manage the use thereof as if the title to same was vested in it."

The Respondent never employed any drivers; made no provision for their employment, maintained no record of their employment, and neither assumed nor exercised any supervision or control over them. (R.P. 66.)

The Petitioner employed all of his drivers (R.P. 57, 62, 66), including R. A. Booth, without the knowledge of War Emergency Co-Operative Association. In addition, the Petitioner paid all of the wages (R.P. 62, 66) of all such employees, including R. A. Booth, deducted social security and withholding taxes from their wages (R.P. 62, 66), and paid premium on Workmen's Compensation insurance for them, based on their wages. The Petitioner is the only person who ever gave any orders, directions, or instructions to R. A. Booth (R.P. 65) or in any way supervised or exercised any control over his activities, or the activities of any other driver, during his entire employment by the Petitioner (R.P. 66, 71), or at any time prior to September 28, 1943.

In addition to the trucks leased by the Petitioner to the Respondent, the Petitioner had a separate business, including a bulk plant and tank delivery trucks for the service of the bulk plant (R.P. 58, 59), all of which was operated by the Petitioner through employees other than the operators of the leased tank trucks.

On, or immediately prior to September 28, 1943, the Petitioner received three orders for the delivery of petroleum products (R.P. 63). Two of these orders were from the Texas Company and the third from the Arkansas Fuel Oil Company (R.P. 64). All three orders were sent directly from the oil companies to the Petitioner (R.P. 63). The third, *i.e.*, the order from the Arkansas Fuel Oil Company, was for the delivery of gasoline to the Petitioner at the bulk plant of the Petitioner. The Petitioner, on the morning of September 28, 1943, directed R. A. Booth to take tank truck #184, which was one of the trucks covered by the

lease to the Respondent, and deliver the three aforesaid orders of petroleum products (R.P. 64, 65). The first delivery was to be made at North Wilkesboro, North Carolina, and was made (R.P. 65). The second was to be delivered from Salisbury, North Carolina, to Kannapolis, North Carolina, and was not made (R.P. 65). The third, from the Arkansas Fuel Oil Company to the Petitioner himself, was to be made from Salisbury, North Carolina, to the bulk plant of the Petitioner at Concord, North Carolina, and was made. The freight on this shipment was prepaid by the Arkansas Fuel Oil Company (R.P. 71). The purchase price of this order was to be paid by the Petitioner direct to the Arkansas Fuel Oil Company (R.P. 72, 73) and would never have cleared through War Emergency Co-Operative Association (R.P. 73, 74). During the attempt to transfer the gasoline from the tank truck of the Petitioner, to the overhead storage tanks of the Petitioner's bulk plant, a fire ensued, resulting in the damage sustained by the Petitioner (R.P. 75).

R. A. Booth sustained severe burns in the fire, from which he died several hours later (R.P. 62). Thereafter, the Petitioner reported the injury and death of R. A. Booth to the North Carolina Industrial Commission (R.P. 63), and in that report and subsequently at a Hearing, conducted by a member of the North Carolina Industrial Commission, the Petitioner contended and testified, under oath, that he employed Booth, gave Booth all of the instructions and directions which Booth received, and that he alone exercised supervision and control over Booth. He further testified that he paid all of the wages of Booth; made deductions from such wages for social security and withholding taxes; and that the Respondent had nothing whatsoever to do with the employment, supervision, or control of Booth. At the

trial in the District Court, the Petitioner repeated the aforesaid testimony (R.P. 63, 64).

This action and three companion actions arising out of the fire above described were originally instituted in the Superior Court of Cabarrus County, North Carolina, less than a week before September 26, 1946, the date on which such action would have been barred by the statute of limitations (R.P. 61). This action and two of the companion actions were duly removed, without opposition, to the United States District Court, for the Middle District of North Carolina at Salisbury, North Carolina. The fourth action continued to pend in the Superior Court of Cabarrus County, North Carolina. The three actions which were removed came on for trial at the August 1947 Term of the United States District Court at Salisbury, North Carolina, and thereafter, on December 31, 1947, judgments were rendered against the Respondent (R.P. 107, 108, 109). Thereafter, in apt time, appeal was prosecuted to the Circuit Court of Appeals for the Fourth Circuit and the causes came on for trial at Asheville, North Carolina, at the July 1948 Term. Said appeals resulted in a reversal of the judgment in favor of the Petitioner herein and the affirmation of the judgments in the two companion cases (R.P. 120).

The Petitioner thereafter, and in apt time, filed his Petition to this Court.

Jurisdiction of This Court

The power of this Court to review decisions of the Circuit Court of Appeals, by certiorari, in proper cases is not denied. However, the evidence and law in this case does not present a question for review within Rule 38 (5) (b) or U. S. Code, Sec. 1254 (1) (Formerly 28 U.S.C. 347 (a)).

Questions Involved

The Petitioner queries:

> "Under the provisions of Part II of the Interstate Commerce Act (49 U. S. C. 301 et seq.), and the rules and regulations of the Interstate Commerce Commission, is the driver of a motor vehicle leased to a franchise interstate motor carrier the agent of the carrier?"

The Circuit Court of Appeals for the Fourth Circuit answered that question in the negative. The Respondent contends that the decision is correct and the reasoning sound and conclusive.

The Petitioner further queries:

> "More particularly, did the Court of Appeals err in holding as a matter of law that the driver of the leased equipment was not the agent of the Respondent, but was the agent of the Petitioner, who was termed an independent contractor?"

The Circuit Court of Appeals for the Fourth Circuit answered that question against the Petitioner. The Respondent contends that the decision is correct and the reasoning sound and conclusive.

Reasons Relied On for the Allowance of the Writ

For the convenience of the Court, the Respondent proposes to discuss each reason briefly in the order stated by the Petitioner and reserve full discussion for "the argument".

(1) It is contended by Petitioner that the question here involved has not been passed upon by this Court and that the question is important to the entire interstate motor carrier industry and to the public. Doubtless the ques-

tion involved is important to the motor carrier industry and the public, but it is properly and adequately controlled and regulated by the laws of the several States, and if we view the decision of the Federal Courts and the Supreme Court of North Carolina correctly, the decision of the Fourth Circuit Court herein is correct.

On this point, we call the Court's attention to the decision of *Venuto* v. *Robinson,* 118 Fed. (2nd) 679. Certiorari denied in 314 U. S. 627; 86 Law Ed. 504. Decided October 13, 1941. *Erie Rd. Co.* v. *Tompkins,* 304 U. S. 64.

(2) Congress did not undertake, by the enactment of the Motor Carrier Act, (Part II, Interstate Commerce Act), to invade the field of the common or general law as applicable in the several States by undertaking to make or propound rules under which the relation of master and servant, principal and agent, and employer and independent contractor are or may be created, or in any way change or alter the Doctrine of Respondeat Superior as applied in the several States.

(3) The decision of the Circuit Court of Appeals as to the agency of the driver in no way involved a question of Federal Law. The Motor Carrier Act (Part II, Interstate Commerce Act) does not undertake to propound rules by which the relationship of master and servant, principal and agent, and employer and independent contractor are or may be created. Nor does it undertake to alter, change or amend the application of the Doctrine of Respondeat Superior as applied under the laws of the several States. Congress was without power under the Constitution to do so, for such would have constituted an invasion of the powers reserved to the several States. The laws of the several States on the subject, while differing to some degree, by long experience, have been found to be adequate and just. The Federal Courts, since the decision of *Erie R. Co.* v.

Tompkins, 304 U. S. 64, have consistently applied such laws of the several States.

(4) The decision of the Circuit Court of Appeals was in complete accord with the decisions of the Supreme Court of North Carolina on the question of agency, and the decision of the Circuit Court of Appeals is not contrary to the decision of the Supreme Court of North Carolina in the case of *Brown* v. *Trucking Lines,* 227 N. C. 299; 42 S. E. (2nd) 71; or *Wood* v. *Miller,* 226 N. C. 567, 39 S. E. (2nd) 608. On the contrary, it is in full accord with the principles announced in those decisions. It is, further, fully in accord with numerous other decisions of the Supreme Court of North Carolina on the question of agency including *Beach* v. *McLean,* 219 N. C. 521, 14 S. E. (2nd) 515; *Thomas* v. *Gas Co.,* 218 N. C. 429, 11 S. E. (2nd) 297; *Russell* v. *Oil Co.,* 206 N. C. 341, 174 S. E. 101; *Aderholt* v. *Condon,* 189 N. C. 748, 128 S. E. 337; *Hayes* v. *Elon College,* 224 N. C. 11, 29 S. E. (2nd) 137; *Bryson* v. *Lumber Co.,* 240 N. C. 664, 169 S. E. 276.

(5) The Doctrine of Estoppel, being of an equitable nature, is not available to the Petitioner so as to relieve him of responsibility for his negligence. Nor will such doctrine impose liability for the negligence of the Petitioner upon another for damage resulting from operations conducted by the Petitioner as an independent contractor for his negligence or that of an employee, whom he directs and controls, for the simple reason that one may not recover on account of his own wrong. *Rawson* v. *Jones-Winifrede Coal Company,* 100 W. Va. 263, 130 S. E. 492.

WHEREFORE, the Respondent respectfully prays that the Petition for Writ of Certiorari be denied and that the Respondent may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your Respondent will ever pray.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 407

A. C. WIDENHOUSE, INDIVIDUALLY, AND TRADING AS CAROLINA, OIL COMPANY,

Petitioner,

versus

WAR EMERGENCY CO-OPERATIVE ASSOCIATION,

Respondent.

PART II—ANSWER TO BRIEF OF PETITIONER

For clarity and the convenience of the Court, the Respondent shall continue to follow the outline of the Brief of the Petitioner, and thereafter discuss such pertinent questions as were omitted by the Petitioner.

I. Opinion of the Court Below

The opinion of the Court below is correctly set out in the Record (R. P. 114).

II. Jurisdiction

1. The power of the Court to review the decision of the Court of Appeals in proper cases is not denied. This, however, is not such a case.

2. The judgment, if Petition is granted, was entered by the United States Court of Appeals for the Fourth Circuit on August 14, 1948 (R. P. 121).

3. Respondent contends that there is no question of Federal law involved in this case nor has the Court of Appeals decided an important question of local law in conflict with the applicable local decisions. Therefore, the Petition does not fall within Rule 38 (5)(b).

III. Statement of Case

The Petitioner's statement of the facts relevant to the matters involved is not supported by the evidence in the Record in this case. The relevant facts are correctly set out hereinbefore under the heading, "Statement of Matters Involved".

IV. Specification of Errors

1. Reversal of the District Court by the Circuit Court of Appeals was not erroneous.

2. No error was committed by the Court of Appeals in concluding and holding that the driver of the leased equipment was the agent of the Petitioner and not of the Respondent and in holding that the Petitioner was an independent contractor.

V. ARGUMENT

The questions involved are:

(a) The question of agency under the Doctrine of Respondeat Superior.

(b) Can a contract in writing be abrogated or changed by oral agreement and subsequent conduct of the parties in ratification of such abrogation or change?

(c) When a written contract has been changed by oral agreement and conduct of the parties thereafter, is the Doctrine of Estoppel available to either of the parties to enforce the original contract?

(d) May one of two joint wrongdoers recover of the other for their joint wrong?

Summary

The Respondent will reply to problems A, B, C, D, E and F of Petitioner's Brief in the order discussed by the Petitioner and thereafter discuss the remaining questions involved.

PETITIONER'S POINTS A & B: It is admitted that the growth of a motor carrier industry induced Congress to enact the Motor Carrier Act (Part II of the Interstate Commerce Act, 49 U. S. C. 301 *et seq.*) and that such Act was passed after careful study and consideration. Nor is it denied that it was the intent of Congress to regulate certain phases of activities in the motor carrier industry. However, Congress was without power to enact legislation which would change, alter or amend the general laws of the several States which creates the relationship of master and servant, principal and agent, and employer and independent contractor, or to alter, amend, or change the Doctrine of Respondeat Superior as it is applied by such general laws of the several States. The Motor Carrier Act did not intend or attempt to regulate all of the activities of all of the employees in the motor carrier industry. In *United States* v. *American Trucking Association,* 310 U. S. 534-538, it is said:

> "Our conclusion, in view of the circumstances set out in this opinion, is that the meaning of 'employees' in Section 204 (a)(1) and (2), is limited to those employees whose activities affect the safety of operation. The Commission has no jurisdiction to regulate the

qualifications or hours of service of any others. The decree of the District Court is accordingly reversed and it is directed to dismiss the Complaint of the Appellees."

If the Commission was without jurisdiction to regulate all of a class of employees in the industry, it surely cannot be seriously argued that it could regulate the application of the law of agency or master and servant as related to a part of the employees of the industry and leave the remainder to be regulated by the general laws of the several States.

In the enactment of Part II of the Interstate Commerce Act, the Congress was concerned with the qualification of drivers and the safety of operation. It was not concerned with the creation of a new set of rules under which the relationship of master and servant, principal and agent, employer and independent contractor is established, nor the Doctrine of Respondeat Superior as it is applied to those branches of the law. These branches of the law were left by the Congress to be interpreted and applied according to the general laws of the several States. It is seriously doubted that Congress, under the Constitution, had the power to invade that field.

The Petitioner relies upon *Boutell* v. *Walling,* 327 U. S. 463. That case does not deal with any of the questions involved here, but deals with the Fair Labor Standards Act and no point in that case is pertinent to the questions presented here.

The decision of the Circuit Court of Appeals in this case does not in any way nullify, alter or restrict the authority of the Interstate Commerce Commission to regulate common carriers by motor vehicle in any of the respects in which it is authorized by the Act of Congress to so regulate.

Petitioner's Point C: Congress has entered the field of the regulation of interstate commerce but has not, and has

no power to, enter the field of the general law of the several States. Therefore, no Federal question is involved. *Hudson* v. *Monier,* 304 U. S. 397; *Erie Railroad* v. *Tompkins,* 304 U. S. 64; *Venuto* v. *Robinson,* 118 Fed. (2nd) 679.

In *Hudson* v. *Monier, supra,* it is held in a *per curiam* that the law of the State should be applied in the United States District Court where, in determining the liability of the driver and lessor of trucks not equipped with a horn or other signaling device, a third party was injured.

In *Erie Railroad* v. *Tompkins, supra,* it is said:

> "There is no Federal common law, and Congress has no power to declare substantive rules of common law applicable in a State, whether they be local or general in their nature, be they commercial law or a part of the law of torts."

On page 79, the Court further stated:

> " 'but law in the sense in which Courts speak of it today does not exist without some definite authority behind it. The common law, so far as it is enforced in a State, whether called common law or not, is not the common law generally but the law of that State existing by the authority of that State without regard to what it may have been in England or anywhere else . . . the authority and only authority is the State, and if that be so, the voice adopted by the State as its own (whether it be of its Legislature or of its Supreme Court) should utter the last word.' "

Petitioner's Point D: The Federal Statutes involved here, and relied upon by Petitioner, make no effort to invade the authority of the States to announce the fundamental law of master and servant, employer and independent contractor.

The Federal Courts have applied the State law in cases like the case at bar since this Court announced the principle

set out in *Erie Railroad* v. *Tompkins, supra*, among which are *Venuto* v. *Robinson*, 118 Fed. (2nd) 679; *Hodges* v. *Johnson*, 58 Fed. Sup. 488; *Crimp* v. *Cresto Transfer Co.*, 50 Fed. Sup. 534; *Malisfski* v. *Indemnity Insurance Co.*, 135 Fed. (2nd) 910; *Craige* v. *Austin Powder Co.* (4th Cir.) 91 Fed. (2nd) 664; *Standard Oil Co.* v. *Anderson*, 212 U. S. 215, 221, 222, 53 Law Ed. 480; *Norfolk & W. R. Co.* v. *Hall* (4th Cir.), 57 Fed. (2nd) 1004, 1008; *Ewing* v. *Vaughn* (4th Cir.), 169 Fed. (2nd) 837.

Moreover, in *Venuto* v. *Robinson, supra*, the Circuit Court of Appeals for the Third Circuit held:

> "Nevertheless, Robinson being in New Jersey in pursuance of the business which was the subject matter of the contract, *the law of New Jersey is the one to be referred to in determining the rules of liability arising from the relationship of the parties. The first of these questions is whether the relationship between Ross and Robinson was that of master and servant or employer and independent contractor. This is to be determined by the law of New Jersey.* Restatement, Conflict of Laws, Sec. 387. Ordinarily, the problem of determining, upon evidentiary facts, whether the relationship between the parties is that of master and servant or employer and independent contractor is one to be answered by the triers of the facts. Restatement, Agency, Sec. 220. But here, as in many other places in the law, answers to the fact questions have been crystallized through judicial determination. *If facts comparable to those in this case have been crystallized into judicial rule in New Jersey, that rule governs in the Federal Court.*"

The decision of the Circuit Court of Appeals for the Third Circuit from which the foregoing paragraph is quoted was upheld in this Court by denial of Petition for Writ of Certiorari on October 13, 1941. See 314 U. S. 627; 86 Law Ed.

504. *The very problem involved in this litigation was finally determined in the above case in this Court.*

The decision of the lower Court is not in conflict with, but in full accord with, the law of North Carolina, as held by the Supreme Court of North Carolina. In a very comprehensive and well reasoned opinion, the Supreme Court of North Carolina, in *Hayes* v. *Elon College*, 224 N. C. 11, 29 S. E. (2nd) 137, says:

> "What, then, are the elements which ordinarily earmark a contract as one creating the relationship of employer and independent contractor? The cases cited and the authorities generally give weight and emphasis, amongst others, to the following:
>
> 'The person employed (a) is engaged in an independent business, calling or occupation; (b) is to have the independent use of his special skill, knowledge, or training in the execution of the work; (c) is doing a specified piece of work at a fixed price or for a lump sum or upon a quantitative basis; (d) is not subject to discharge because he adopts one method of doing the work rather than another; (e) is not in the regular employ of the other contracting party; (f) is free to use such assistants as he may think proper; (g) has full control over such assistants; and (h) selects his own time' (Then follows citation of a large number of authorities from the Supreme Court of North Carolina and some from other States.)
>
> 'The presence of no particular one of these indicia is controlling. Nor is the presence of all required. They are considered along with all other circumstance to determine whether in fact there exists in the one employed that degree of independence necessary to require his classification as independent contractor rather than employee.'"

Under the above earmarks, (a) A. C. Widenhouse was engaged in an independent business of transportation of

gasoline, not only under the lease in question, but also to and from his own bulk storage plant, and the sale of gasoline therefrom; (b) he had the independent use of his knowledge and training in the execution of the work; (c) in doing a specified piece of work here on a quantitative basis; (d) he was not subject to discharge because he adopted one method of doing work rather than another; (e) he was not in the regular employ of War Emergency Co-Operative Association; (f) he was free to use such assistance as he thought proper and did so; (g) he had full control over such assistance, including Booth and his other drivers; and (h) he selected his own time to make the deliveries of all the orders which he received, including those received on the day before the fire or on the day of the fire.

These earmarks are drawn from a wealth of cases cited in *Hayes* v. *Elon College, supra.* They are the determining factors if and when they concur in establishing the relationship of employer and independent contractor. They all concur in the case at bar.

It is doubtful that it was ever in contemplation of the parties that the provisions of Item 4 of the lease would become effective. If it was, they immediately abandoned the idea for it is crystal clear from the record that the Respondent never employed drivers or exercised the slightest supervision or control over them.

The Supreme Court of North Carolina in *Beach* v. *McLean*, 219 N. C. 251, 14 S. E. (2nd) 515, says:

> "An independent contractor is one who undertakes to produce a given result, but so that in the actual execution of the work he is not under the order or control of the person for whom he does it, and may use his own discretion in things not specified. Pollock Torts, 78; Barrows on Negligence, 160. The vital test in determining whether a person employed for the works is an

> independent contractor or a mere servant for the control over the work which is reserved by the employer. Stated as a general proposition, if the contractor is under the control of the employer, he is a servant; if not under such control, he is an independent contractor. 14 R.C.L. 67; Aderholt *v.* Condon, 189 N.C. 748, 129 S.E. 337; Russell *v.* Oil Company, 206 N.C. 341, 174 S.E. 101."

Brown v. *Trucking Company*, 227 N.C. 299, 42 S.E. (2nd) 71, upon which the Petitioner relies is not in conflict with the decisions above cited and is readily distinguished from the case at bar in the following essential respects:

1. It arose under the North Carolina Workmen's Compensation Act, "General Statutes of North Carolina, Chapter 97," which defines employee as follows:

> "G.S. 97-2 (B) Employee. The term 'employee' means every person engaged in an employment under any appointment or contract of hire or apprenticeship, express or implied, oral or written, including aliens, and also minors, whether lawfully or unlawfully employed, but excluding persons whose employment is both casual and not in the course of the trade, business, profession, or occupation of his employer. . . ."

In the case at bar, Booth was held under the above quoted section to be the employee of the Petitioner Widenhouse by the North Carolina Industrial Commission, a court of competent jurisdiction administering an exclusive right and remedy between employer and employee, the findings of fact of which were binding on all courts of general or appellate jurisdiction. *Gabriel* v. *Town of Newton*, 227 N.C. 314, 42 S.E. (2nd) 96; *Rewis* v. *New York Life Ins. Co.*, 226 N. C. 325, 38 S.E. (2nd) 97; *Fox* v. *Cramerton Mills*, 225 N.C. 580, 35 S.E. (2nd) 869.

2. In *Brown* v. *Trucking Company*, the parties were acting under a contract in writing, to-wit: the lease; and abiding

by all, each and every of the terms of the lease. The plaintiff at the time was actively under the exclusive control, supervision and direction of the defendant, executing the orders of the defendant as to the manner and method of the performance of the work.

In the case at bar, the Petitioner and Respondent, by verbal agreement and by a course of dealings, had abrogated all of the important terms of the contract, to-wit: the lease; were observing none of its provisions, and were operating exclusively under the terms of the substitute agreement. Under such substitute agreement, the Respondent neither reserved nor undertook to exercise any supervision or control in any manner over the activities of the driver Booth. The Petitioner performed every obligation to Booth that was due an employee by an employer. The Respondent performed no obligation to Booth, was under no such obligation to Booth and was wholly unaware of his employment or existence.

3. The work being performed at the time the cause of action arose was done for the sale benefit of the Petitioner, the Respondent had no interest, no right and no duty to anyone in the performance of the work being accomplished by the driver Booth when the cause of action arose. The Petitioner received the order for the transportation of goods for himself from the shipper, the Arkansas Fuel Oil Company, the freight being fully prepaid, payment to be made directly to Arkansas Fuel Oil Company by the Petitioner and nothing to clear through, be reported to, or to accrue to the Respondent.

4. The petroleum products being delivered to the Petitioner was the sole property of the Petitioner and to be resold for his sole benefit and profit.

Wood v. *Miller*, 226 N.C. 567, 39 S.E. (2nd) 608, is distinguished for the same reasons.

5. It is emphasized by the Respondent that in *Wood* v. *Miller* and *Brown* v. *Trucking Co.*, there was no controversy as to the essential facts. In those cases, the written lease was in full force and effect. It had not been altered in any way. Also, the employer (Defendant) actually and effectively exercised the most minute control and supervision possible over the employee (Plaintiff) both as to the time, place, manner and method of the performance of the work and the end result to be accomplished.

Petitioner's Point E: It is conceded that on August 13, 1936, the Interstate Commerce Commission issued Administrative Ruling #4 as set out in the Brief of the Petitioner. The Court below, however, did not err in holding that the driver of the leased equipment was not the servant of the Respondent as a matter of law because the Administrative Ruling #4 of August 13, 1936 related solely to the relationship between the operators of motor vehicles in Interstate Commerce (the Petitioner and Respondent on the one hand, and the general public and shippers on the other hand) and was exclusively for the protection of the general public and shippers in interstate commerce. It is urged that the Court below correctly interpreted and applied the law as between the Petitioner and the Respondent because the substituted agreement, by which the major and pertinent provisions of the lease was abrogated and changed, and the course of dealings thereafter had between the parties, in ratification of the new oral contract, established their legal relationship. It became the only enforcible relationship as between the Petitioner and the Respondent.

As stated by Parker, Senior Circuit Judge, in the opinion of the Circuit Court of Appeals:

> "Estoppel operating in behalf of the general public to prevent the holder of the license from denying responsibilities for damage resulting from operations

conducted thereunder by an independent contractor manifestly cannot be extended to protect the independent contractor himself from responsibility for his own negligence or that of employees whom he directs and controls for the simple reason that no one may recover on account of his own wrong. Both Widenhouse and defendant were responsible to third persons for damage resulting from the negligence of the drivers of the truck; but defendant is not responsible to Widenhouse, since the damage of the latter resulted from the negligence of his own employees for which he is responsible."

Administrative Ruling #4, dated August 13, 1936, was a directive to operators and lessors as to the manner in which operations should be carried on. The lease in this case contained, in substance, the terms of said Administrative Ruling. However, the lease and the ruling were both ignored and abrogated, and as between the parties to the lease, became null and void and of no effect. By mutual agreement between themselves they wrongfully nullified the ruling, abrogated essential provisions of the lease, both parties being in *pari delicto*. The law, equity, and good conscience will not now permit one, a wrongdoer, to profit by his wrong as against the other, a joint wrongdoer, or any other person.

Petitioner contends that the equipment was used exclusively by Respondent in its operation as a common carrier. The evidence shows conclusively that the equipment and driver, on the day in question, were transporting petroleum products of the Petitioner for the sole use, benefit and profit of the Petitioner.

PETITIONER'S POINT F: It is reiterated on behalf of the Respondent that the certificate of convenience and necessity, and the franchise granted thereunder, was for the mutual benefit of the members of the Association, of which

the Petitioner was one, as well as for the benefit of the Respondent. It would be a flagrant example of permitting a wrongdoer, who has flouted the law in the face of constituted public authority, to recover for his wrongful act were the Petitioner herein permitted to recover after he knowingly, designedly, and intentionally disregarded the original provisions of the lease and the provisions of Administrative Ruling #4 of the Interstate Commerce Commission; and thereafter actively and openly changed all of the essential conditions of the lease and assumed full authority to employ, pay, supervise, direct and control the driver whose negligence proximately caused the damage for which he now seeks to recover. The Doctrine of Estoppel is available only to him who comes into Court with clean hands and is not available as between joint wrongdoers.

It is to be remembered that the Petitioner, A. C. Widenhouse, as well as the Respondent, was an original party to the lease; that the shipment of gasoline was to the Petitioner's bulk plant; for Petitioner's own use, benefit and profit; was received by the Petitioner direct from the Arkansas Fuel Oil Company, and the remittance for the shipment was to be made direct by the Petitioner to the said oil company; that the payment therefor did not go through the hands of the Respondent; and that Respondent derived no profit whatsoever from the transaction.

VI. Questions Advanced by Respondent

A. The question of agency under the Doctrine of Respondeat Superior.

This question is fully discussed in Respondent's reply to Petitioner's Brief.

B. Can a contract in writing be abrogated or changed by oral agreement and subsequent conduct of the parties in ratification of such abrogation or change?

"One party to a contract cannot alter its terms without the assent of the other; the minds of the parties must meet as to the proposed modification . . . The fact of the agreement may be implied from a course of conduct in accordance with its existence. So assent may be applied from acts of one party in accordance with the terms of a change proposed by the other; but it is not sufficient to show an ambiguous course of dealings from which one party might reasonably infer that the original contract was in force, and the other that it had been changed. A promise to ratify acts done under the contract may amount to an assent to modification." 13 C. J. Page 591, Sec. 606.

"Parties to a written contract may abandon, modify, or change it by words or by conduct." Elliott *v.* Lindquist, 169 A. L. R. 1370 (See also A. J. "Contracts" Sec. 427, 428)

"A written contract may be abandoned or relinquished: (1) by agreement between the parties; (2) by conduct clearly indicating such purpose; (3) by the substitution of a new contract inconsistent with the existing contract." Bixler *v.* Britton, 192 N. C. 199, 134 S. E. 488, and cases cited therein. Hotchner *v.* Neon Products, 163 Fed. (2nd) 672. This propisition of law is so elementary that further citations of authority would amount to redundancy.

The evidence in the case at bar conclusively demonstrates that the parties to the lease by their acts, as evidenced by their course of dealings, completely abrogated Items 1, 2 and 4 of the lease and substituted therefor terms and conditions which without question constituted the Petitioner an independent contractor and made Booth his employee.

C. When a written contract has been changed by oral agreement and conduct of the parties thereafter, is the Doctrine of Estoppel available to either of the parties to enforce the original contract?

"Where one having the right to accept or reject a transaction takes and retains benefits thereunder, he

ratifies the transaction, *is bound by it and cannot avoid its obligations or effect by taking a position inconsistent therewith.* 21 C. J. Page 1206, Sec. 207.

"In general terms, it is said that a man may not assume and maintain inconsistent position to the prejudice of another's rights. *He cannot retain the benefits of a contract and repudiate its obligations and burdens,* nor can he hold to the advantages acquired in the course of a business deal or negotiation, and by reason of it, when he has himself renounced and refused to abide by its terms." Maxton Auto Co. *v.* Rudd, 176 N. C. 497, 97 S. E. 477. This proposition of law is also so elementary that it requires no further citation of authority.

The Petitioner consciously, openly and fully engaged in the arrangement between the parties after the abrogation of Items 1, 2 and 4 of the written lease. He consciously, openly and knowingly accepted and retained the benefits of the change in the lease. He cannot now in good conscience repudiate the obligations he assumed under the new arrangement. He is bound by its terms. Its terms are clearly defined by his conduct. See also *Mercantile Commerce Bank & Trust Co.* v. *Equitable Life Assn. Soc.,* 143 Fed. (2nd) 397; *Lord Construction Co.* v. *United States,* 28 Fed (2nd) 340.

D. May one of two joint wrongdoers recover of the other for their joint wrong?

"Public policy in this jurisdiction, buttressed by the uniform decisions of this Court, will not permit a wrongdoer to enrich himself as a result of his own misconduct." Davenport *v.* Patrick, 227 N. C. 686, 44 S. E. (2nd) 203; Reid *v.* City Coach Co., 215 N. C. 469, 2 S. E. (2nd) 578; The Arrogante Barcelones, 20 U. S. 496, 7 Wheat. 496, 5 Law Ed. 507; Brown *v.* New York Life, 152 Fed. (2nd) 246. This principle of law is so fundamentally just that its substantiation requires no citation of authority.

It was the negligence of Booth, who was the servant of the Petitioner acting under the direct supervision and control of the Petitioner, which proximately caused the damage for which the Petitioner seeks to recover. In the eyes of the law the act of Booth was the act of the Petitioner, who may not now repudiate a long course of dealings in order that he may profit by his own wrongful act.

Conclusion

For the reasons set forth above, it is respectfully submitted and urged that the decision of the Circuit Court of Appeals was sound, correct and just. Therefore, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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R. HOYLE SMATHERS,
J. BAT SMATHERS.